

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAYTHEON COMPANY	:	DETERMINATION
for Redeterminations of Deficiencies or for Refunds of New	:	DTA NOS. 829739 AND
York State Corporation Franchise Tax Under Article 9-A of the	:	829740
Tax Law for the Tax Years Ended December 31, 2010 through	:	
December 31, 2015.	:	

Petitioner, Raytheon Company, filed petitions for redeterminations of deficiencies or for refunds of New York State corporation franchise tax under article 9-A of the Tax Law for the tax years ended December 31, 2010 through December 31, 2015.

On May 16, 2022 and May 17, 2022, respectively, petitioner, appearing by the Roberts Law Group, PLLC (R. Gregory Roberts, Esq., of counsel), and the Division of Taxation, by Amanda Hiller, Esq. (David Markey, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by September 16, 2022, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Raytheon combined group is entitled to calculate its tax for each year during the period at issue using the reduced tax rates set forth in Tax Law former § 210 applicable to a qualified New York manufacturer, an eligible qualified New York manufacturer or a qualified emerging technology company.

II. Whether the Raytheon combined group is entitled to an abatement of penalties for the 2013, 2014 and 2015 tax years.

FINDINGS OF FACT

The parties executed a stipulation of facts in connection with this matter. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein. In addition, petitioner submitted 104 proposed findings of fact which are accepted and have been incorporated into the findings of fact.

1. Petitioner, Raytheon Company, is a Delaware corporation with its principal executive offices located in Waltham, Massachusetts.

2. Petitioner is the parent company of an affiliated group of entities providing state-of-the-art electronics, mission systems integration and other capabilities in the areas of: (i) sensing; (ii) effects; (iii) command; control, communications and intelligence systems; and (iv) a wide range of mission support services to defense and other government markets.

3. For each year during the tax years ended December 31, 2010 through December 31, 2015 (period at issue), petitioner and its affiliates (the Raytheon combined group) filed combined corporate franchise tax and metropolitan commuter transportation business tax surcharge reports (combined reports), which included all of petitioner's affiliates except Marshall Insurance Group, Ltd.

4. During the 2010 through 2012 tax years, the Raytheon combined group organized its business into six business segments: (i) Integrated Defense Systems (IDS); (ii) Intelligence and Information Systems (IIS); (iii) Missile Systems (MS); (iv) Network Centric Systems (NCS); (v) Space and Airborne Systems (SAS); and (vi) Technical Services (TS).

5. For the 2013 and 2014 tax years, the Raytheon combined group organized its business into four business segments: (i) IDS; (ii) MS; (iii) IIS; and (iv) SAS.

6. For the 2015 tax year, the Raytheon combined group organized its business into five business segments: (i) IDS; (ii) MS; (iii) IIS; (iv) SAS; and (v) Forcepoint.

The Integrated Defense Systems Business Segment

7. IDS is a leader in the technology, development and production of integrated air and missile defense, radar solutions, and naval combat and ship electronic systems, delivering combat-proven performance against the complete spectrum of airborne and ballistic missile threats.

8. IDS is a world leader in the technology, development and production of sensors and mission systems, providing solutions to customers such as the Department of Defense, the U.S. intelligence community and the Federal Aviation Administration (FAA).

9. IDS is headquartered in Tewksbury, Massachusetts.

10. IDS' primary product lines include: (i) Global Integrated Sensors; (ii) Integrated Air & Missile Defense; (iii) Seapower Capability Systems; and (iv) Command, Control, Communications, Computers and Intelligence (C4I).

11. The Global Integrated Sensors (GIS) product line provides integrated whole-life air and missile defense systems.

12. GIS produces systems and solutions such as: (i) the Joint Land Attack Cruise Missile Defense Elevated Netted Sensor, which is a theater-based, advance sensor system that provides long-endurance over-the-horizon detection and tracking capabilities; (ii) early warning radars, including the Army Navy/Transportable Radar Surveillance-Model 2; and (iii) the Upgraded Early Warning Radar family of sensors and other land-based surveillance and search radars that

provide threat protection, precision tracking, discrimination and classification of ballistic missile threats.

13. The Integrated Air & Missile Defense product line produces combat-proven air and missile defense systems, such as the (i) Patriot Air & Missile Defense System, (ii) National Advanced Surface-to-Air Missile System, and (iii) Hawk XXI advanced air defense system against low-to-medium altitude air threats.

14. The Seapower Capability Systems (SCS) product line produces and integrates maritime air and missile defense radar systems, naval combat management and airborne antisubmarine and mine warfare systems, as well as sensors, maritime naval navigation systems and torpedoes for the U.S. Navy.

15. SCS' primary products include: (i) SPY-3, the U.S. Navy's first shipboard active array multifunction radar; (ii) radar transmitters for the sea and land-based Aegis weapon system radars; and (iii) the Ship Self Defense System, an open, distributed combat management system for U.S. Navy carriers and amphibious ships.

16. C4I develops, produces, delivers and supports complex integrated, networked, actionable combat command and control solutions for air and land combat commanders, air traffic management systems and border and critical infrastructure protection.

17. C4I's primary products include: (i) AutoTrac III surveillance radars; and (ii) Standard Terminal Automation Replacement System (STARS) for the Department of Defense and the FAA.

18. C4I was part of the NCS business segment prior to 2013.

19. Pursuant to the Raytheon combined group's contract with the FAA, petitioner replaced air traffic control systems at the FAA's Terminal Radar Approach Control (TRACON) facilities in New York and around the country with STARS.

20. The Raytheon combined group's STARS Program is a single, state-of-the-art platform that integrates both radar data and flight information for high-resolution display, providing air traffic controllers the ability to verify spacing, direction, headings, vectors, conflict alerts, and weather advisories, while increasing stability and cost effectiveness in airports.

21. The displays receive and process weather reports and other information from terminals and other sensors, providing aircraft positioning and six distinct levels of weather data.

22. Air traffic controllers in TRACON facilities use STARS to provide safe and efficient aircraft spacing and sequencing guidance for departing and arriving aircraft at U.S. airports and military terminal areas.

The Missile Systems Business Segment

23. MS develops, produces and supports a broad range of advanced weapons systems, including missiles, smart munitions, close-in weapon systems, projectiles, kinetic kill vehicles, directed energy effectors and advanced combat sensor solutions.

24. MS is headquartered in Tucson, Arizona.

25. MS' primary product lines include: (i) Air Warfare Systems; (ii) Air and Missile Defense Systems; (iii) Naval and Area Mission Defense Systems; and (iv) Land Warfare Systems.

26. Air Warfare Systems (AWS) products enable the U.S. armed forces and international customers to attack, suppress and destroy air- and ground-based targets.

27. AWS' primary products include: (i) the AMRAAM air-to-air missile, a state-of-the-art battle proven air-to-air missile that also has surface-to-air launch applications; (ii) the Tomahawk cruise missile, an advanced surface-or submarine-launched cruise missile; (iii) the SDB II air-to-ground glide weapon designed to engage moving targets in adverse weather and battleground conditions; (iv) the Paveway family of laser-guided and GPS guided smart bombs; (v) the Joint Standoff Weapon, a family of air-to-ground weapons that employ an integrated GPS/inertial navigation system that guides the weapon to its target; and (vi) the High-Speed Anti-Radiation Missile (HARM) and the HARM Targeting System.

28. The Air and Missile Defense Systems product line designs, develops, produces and supports air defense and ballistic missile defense interceptor systems.

29. The Air and Missile Defense Systems products include: (i) the Standard Missile-6; and (ii) multiple versions of the SM-3™, which are core elements of the Missile Defense Agency's approach to global missile defense.

30. The Naval and Area Mission Defense Systems product line produces a complete family of mission solutions providing layered ship defense for navies around the world.

31. The Naval and Area Mission Defense Systems products include: (i) the Phalanx Close-In Weapon System (employed afloat and ashore); (ii) the Rolling Airframe Missile and Launcher System; (iii) the SeaRAM™ ship defense system; (iv) Standard Missile-2 system that defends against anti-ship missiles and aircraft; and (v) the Evolved Seasparrow/Sparrow family of missiles for layered ship mission protection against air, subsurface and surface cruise/ballistic missile threats.

32. The Land Warfare Systems (LWS) product line produces integrated mission solutions in the land domain for the U.S. Army, Marine Corps and more than 40 allied nations,

giving warfighters the power, mobility and situational awareness to stay ahead of evolving threats.

33. LWS resulted from the 2013 combination of the Land Combat (formerly in the MS business segment) and Combat Sensing Systems (formerly in the NCS business segment) product lines.

34. LWS' products include: (i) the tube-launched, optically tracked, wireless-guided weapon system, a long-range precision anti-armor/anti-fortification/anti-amphibious-landing weapon system; (ii) Javelin, a shoulder-fired, fire-and-forget anti-tank weapon; (iii) Stinger, a lightweight, self-contained, fire-and-forget, very short-range air defense system; (iv) enhanced Long Range Advanced Scout Surveillance System, a third generation, multi-sensor system that provides the ability to detect, identify and geo-locate distant targets; and (v) a family of light to heavy thermal weapon sights.

The Network Centric Systems Business Segment

35. NCS was a separate business segment for the 2010 through 2012 tax years.

36. The NCS product lines became part of the IDS, MS and SAS business segments beginning in 2013.

37. NCS leveraged the capabilities of the network through communications, sensors, and command and control systems, to develop and produce solutions for land combat modernization, international and domestic air traffic management and other transportation systems, military and civil communications, and homeland security.

38. NCS was headquartered in McKinney, Texas.

39. NCS' primary product lines included: (i) C4I; (ii) Combat and Sensing Systems; and (iii) Advanced Programs.

40. As discussed above, the C4I product line develops, delivers and supports complex integrated, networked, actionable combat command and control solutions for air and land combat commanders, air traffic management systems, and border and critical infrastructure protection.

41. During the 2010 through 2012 tax years, C4I's primary products included: (i) the provision of air traffic management solutions internationally through its AutoTrac III product line and surveillance radars; (ii) STARS provided to the Department of Defense and the FAA; (iii) the Sentinel air defense and Firefinder weapon-locating radar systems used by the U.S. Army and Marine Corps; and (iv) the Battle Control System, an air command and control system used by the U.S. Air Force.

42. The Combat and Sensing Systems product line provided integrated ground-based surveillance and target engagement solutions designed to provide a significant advantage to warfighters.

43. The Combat and Sensing Systems line's products included: (i) the enhanced Long Range Advanced Scout Surveillance System used by the U.S. Army, which provides the ability to detect, identify and geo-locate distant targets; (ii) the Multi-Function Radio Frequency System, a close-combat tactical radar that provides counter rocket, artillery, and mortar sense and warn capabilities; and (iii) medium and heavy Thermal Weapon Sights provided to the U.S. Army.

44. The Advanced Programs product line provided a broad range of imaging capabilities, including next-generation X-ray, visible, infrared, and millimeter wave focal plane and scanning arrays for weapons, thermal imaging, earth remote sensing and astronomy applications.

45. The Advance Programs line's primary products included: (i) the Boomerang sniper detection system, a soldier-worn sniper alert system; and (ii) TransTalk, a smartphone application that automatically translates speech into another language.

46. The Advanced Programs product line was the Defense Advanced Research Project Agency's largest supplier of Cooperative Research and Development.

The Space and Airborne Systems Business Segment

47. SAS is a leader in the design, development, and production of integrated sensor and communication systems for advanced missions, providing electro-optical and infrared sensors, airborne radars for surveillance and fire control applications, lasers, precision guidance systems, signals intelligence systems, processors, electronic warfare systems, communication systems, and space-qualified systems for civil and military applications.

48. During the period at issue, SAS was headquartered in El Segundo, California, and, beginning in 2013, in McKinney, Texas.

49. SAS' primary product lines include: (i) Intelligence, Surveillance and Reconnaissance Systems; (ii) Tactical Airborne Systems; (iii) Electronic Warfare Systems; (iv) Integrated Communications Systems; and (v) Space Systems.

50. The Intelligence, Surveillance and Reconnaissance Systems (ISRS) product line designs, produces and integrates sensor and targeting solutions that enable actionable information for strike, persistent surveillance, and special mission applications.

51. ISRS also provides integrated solutions for all tiers of airborne intelligence, surveillance and reconnaissance systems.

52. ISRS' products include: (i) the APY-10 radar on the U.S. Navy's P-8A Poseidon; (ii) the SeaVue radar on the Predator Guardian unmanned aircraft system; (iii) the Multi-Platform

Radar Technology Insertion Program on the U.S. Air Force's Block 40 Global Hawk and NATO Alliance Ground Surveillance system; and (iv) the Multi-Spectral Targeting System on the U.S. Air Force's Reaper unmanned aircraft system, and the U.S. Navy's MH-60R/S Sea Hawk helicopter.

53. The Tactical Airborne Systems (TAS) product line designs, produces and develops cost-effective, high-performance integrated sensor solutions for tactical and strategic platforms.

54. TAS' products include: (i) integrated sensor systems with advanced fire control radars and processor technologies for customers including the U.S. military and international governments; and (ii) Active Electronically Scanned Array radars for the U.S. Air Force's F-15 and B-2 aircraft, the U.S. Navy's F/A-18E/F and EA-18G.

55. Through the Electronic Warfare Systems (EWS) product line, the Raytheon combined group designs and produces high-performance electronic warfare systems and equipment for strategic and tactical aircraft, helicopters, surface ships and ground forces for the U.S. military and intelligence agencies, and international governments.

56. EWS' products include: (i) the Next Generation Jammer program; (ii) integrated electronic warfare suites; (iii) the development of electronic warfare planning and management tools; (iv) the Multi-function Integrated Receiver/Exciter System product family; and (v) advanced classified programs and products such as towed decoys, radar warning receivers and missile warning sensors.

57. Through the Integrated Communications Systems (ICS) product line, the Raytheon combined group provides tactical airborne communications, software-defined radio technology, advanced tactical networking, and real-time sensor networking.

58. For the 2010 through 2012 tax years, the Integrated Communications Systems product line was part of the NCS business segment.

59. ICS' products include: (i) MAINGATE, an interoperable battlefield communications platform that provides a broadband gateway between separate radio systems; (ii) the Secure Mobile Anti-Jam Reliable Tactical Terminal, a low-cost, extremely high frequency satellite terminal that provides robust, low probability-of-detection, jam resistant, multi-channel communications; and (iii) Advanced Extremely High Frequency satellite terminals for all branches of the U.S. military.

60. Through the Space Systems product line, the Raytheon combined group designs and produces space and space-qualified sensor payloads for large national programs and develops innovative solutions for emerging intelligence, defense and civil space applications.

61. The Space Systems product line's major non-classified program is the Joint Polar Satellite System program providing the Visible Infrared Imaging Radiometer Suite, an advanced imaging and radiometric sensor for NASA and NOAA weather/environmental monitoring programs.

The Intelligence and Information Services Business Segment

62. The Intelligence and Information Services Business Segment (IIS) provides a full range of technical and professional services to intelligence, defense, federal and commercial customers worldwide, specializing in global Intelligence, Surveillance and Reconnaissance (ISR), navigation, Department of Defense space and weather solutions, cybersecurity, analytics, training, logistics, mission support, and engineering and sustainment solutions.

63. During the period at issue, IIS was headquartered in Garland, Texas, and, beginning in 2013, in Dulles, Virginia.

64. IIS' primary product lines include: (i) Cybersecurity and Special Missions; (ii) Global Training Solutions; (iii) Intelligence and Earth Observation; and (iv) Mission Support and Modernization.

65. The Cybersecurity and Special Missions product line supports domestic, international and commercial customers by delivering cyber and quick-reaction solutions, and supporting high-consequence special missions.

66. The Global Training Solutions (GTS) product line provides training solutions, logistics and engineering support worldwide, conducting integrated operational training through the U.S. Army's Warfighter Field Operations Customer Support contract.

67. GTS also provides air traffic controller training for the FAA through its Air Traffic Controller Optimum Training Solution (ATCOTS) and designs, implements and manages complex training solutions to align an organization's training requirements with its core business needs.

68. GTS included certain services and products that were previously part of the Technical Services business segment for the 2010 through 2012 tax years, including the ATCOTS program.

69. The Intelligence and Earth Observation (IEO) product line primarily supports programs for the U.S. intelligence community, NASA, NOAA and the U.S. Air Force.

70. IEO's capabilities include ground systems for geospatial intelligence and signals intelligence systems, large scale data processing and exploitation, storage architectures and high-performance data handling and processing systems.

71. IEO's key programs include: (i) the Joint Polar Satellite System, which supports multiple, civil, defense and international polar-orbiting environmental satellites; and (ii) the Global Positioning System Next Generation Operational Control System.

72. The Mission Support and Modernization (MSM) product line provides full life-cycle mission operations, engineering, sustainment and modernization services for site and platform missions, as well as multi-intelligence ground systems and unmanned systems technology for civil agencies and the U.S. Air Force.

73. MSM's programs include advanced ground solutions for tactical ISR missions and upgrades of airborne and sea-based weapons systems and aircraft reconnaissance systems

The Raytheon Combined Group's Emerging Technology Company Business Activities

74. Substantially all of petitioner's products and services are "emerging technologies" as defined under Public Authorities Law § 3102-e (1) (b).

75. Throughout the period at issue, petitioner maintained employees and had office space at various FAA TRACON facilities, airports, and similar facilities throughout New York, including: (i) LaGuardia Airport; (ii) JFK Airport; (iii) Buffalo Niagara International Airport; (iv) Syracuse Hancock International Airport; (v) Albany International Airport; and (vi) Fort Drum (collectively, the New York Locations).

76. Petitioner conducted activities at, and had employees assigned to, all of the New York Locations.

77. Petitioner's activities at the New York Locations involved: (i) the installation and after-installation support of its STARS system to replace air traffic control systems at TRACON facilities in New York, pursuant to its contract with the FAA and the U.S. Department of Defense; (ii) training of air traffic controllers pursuant to its ATCOTS contract with the FAA;

and (iii) the installation and monitoring of its Perimeter Intrusion Detection System (PIDS), which deployed a mix of radars, video motion detectors, smart fences, and day-night assessment cameras that were integrated with command and control software and displayed on closed circuit television monitors to protect airports from intrusions along the perimeter.

78. For the period at issue, petitioner's sales were (a) 97% of the combined group's total sales for the 2010 tax year, (b) 95% for the 2011 tax year, (c) 95% for the 2012 tax year, (d) 95% for the 2013 tax year, (e) 96% for the 2014 tax year and (f) 96% for the 2015 tax year.

The Raytheon Combined Group's Manufacturing Activities

79. Throughout the period at issue, the Raytheon combined group's sales were principally comprised of sales of: (i) goods; (ii) services; (iii) miscellaneous occasional sales of property; and (iv) royalties.

80. On its Federal and New York State tax returns for the period at issue, petitioner identified "manufacturing" as its primary business activity and used Principal Business Activity Code 335900 - Other Electrical Equipment & Component Manufacturing.

81. The Raytheon combined group manufactures approximately 95% of the goods that are sold through its business segments.

82. For each year during the period at issue, more than 50% of the Raytheon combined group's gross receipts were derived from the sale of goods produced by manufacturing, processing or assembling.

83. Neither petitioner nor any member of the Raytheon combined group conducts activities in New York involving the manufacturing, processing or assembling of goods and does not own or lease any property in New York that is used for such purposes.

84. The Raytheon combined group maintains buildings, machinery and equipment and other tangible personal property throughout the United States, other than in New York, that are principally used in the production of goods by manufacturing, processing or assembling.

85. Among other locations, the Raytheon combined group maintains buildings, machinery and equipment and other tangible personal property in Massachusetts that is principally used in the production of goods by manufacturing, processing or assembling.

86. For each year during the period at issue, the Raytheon combined group maintained machinery and equipment in Massachusetts that: (i) was depreciable under Internal Revenue Code (IRC) § 167; (ii) had a useful life of at least four years; (iii) was acquired by purchase as described in IRC § 179; and (iv) was principally used by the Raytheon combined group in the production of goods by manufacturing, processing or assembling.

87. For each year during the period at issue, that property had an adjusted basis for federal income tax purposes that was greater than \$1,000,000.00.

Procedural History

88. The Raytheon combined group timely filed combined tax reports with the Division of Taxation (Division) for each tax year during the period at issue.

89. The Raytheon combined group timely filed an amended combined report for the tax year ended December 31, 2010, on which it claimed a refund of tax in the amount of \$256,330.00 based on the use of the preferential tax rates available to qualified New York manufacturers.

90. The Raytheon combined group also timely filed amended combined reports with the Division for the tax years ended December 31, 2011 and December 31, 2012, on which it claimed a refund of tax in the amount of \$373,724.00 for the 2011 tax year and \$265,285.00 for

the 2012 tax year based on the use of the preferential tax rates available to qualified New York manufacturers and eligible qualified New York manufacturers.

91. By letter dated August 18, 2016, the Division denied the Raytheon combined group's refund requests for the 2010 through 2012 tax years.

92. On April 13, 2018, the Raytheon combined group timely filed requests for conciliation conference for each tax year with the Division's Bureau of Conciliation and Mediation Services (BCMS) appealing the denial of the refund claims.

93. On August 16, 2019, BCMS issued a conciliation order sustaining the August 18, 2016 refund denial.

94. On November 13, 2019, petitioner timely filed a petition with the Division of Tax Appeals appealing the August 16, 2019 conciliation order (the 2010-2012 Petition).

95. The Raytheon combined group timely filed combined tax reports for the 2013 through 2015 tax years applying the reduced tax rates applicable to qualified New York manufacturers.

96. The Raytheon combined group timely filed an amended combined tax report for the tax year ended December 31, 2013, on which it claimed a refund of tax in the amount of \$531,591.00 based on the use of the preferential tax rate available to eligible qualified New York manufacturers.

97. The Division denied the Raytheon combined group's refund request for the 2013 tax year.

98. The Division conducted an audit of the Raytheon combined group for the 2013 through 2015 tax years and, as a result of the audit, issued a notice of deficiency (notice number L-046919205) dated August 4, 2017, that asserted additional tax of \$2,887,647.00, substantial

understatement penalties of \$288,761.00, and interest of \$408,372.61 for the 2013 through 2015 tax years (the 2013-2015 Notice).

99. On November 1, 2017, the Raytheon combined group timely filed a request for conciliation conference with BCMS protesting the 2013-2015 Notice, and the disallowance of the 2013 refund claim.

100. On August 16, 2019, BCMS issued a conciliation order reflecting a negotiated resolution reached by the Raytheon combined group and the Division on matters unrelated to these appeals, but otherwise sustained the 2013-2015 Notice in the amount of \$2,789,012.00 in Tax, \$278,898.00 in penalties and \$1,024,890.00 in interest.

101. On November 13, 2019, the Raytheon combined group timely filed a petition for redetermination with the Division of Tax Appeals appealing the conciliation order issued by BCMS for the 2013 through 2015 tax years (the 2013-2015 Petition).

102. On January 22, 2020, the Division timely filed answers to both the 2010-2012 Petition and the 2013-2015 Petition.

103. On February 10, 2020, the Raytheon combined group timely filed a Reply to both answers filed by the Division.

104. The parties have stipulated that the only issues involved in this matter are whether (i) the Raytheon combined group is entitled to calculate its tax for each year during the period at issue using the reduced tax rates set forth in Tax Law former § 210 applicable to: (a) a qualified New York manufacturer, (b) an eligible qualified New York manufacturer and/or (c) a qualified emerging technology company, and (ii) whether the Raytheon combined group is entitled to an abatement of penalties for the 2013, 2014 and 2015 tax years.

CONCLUSIONS OF LAW

A. Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law former § 209 [1]).¹

B. In New York, corporate taxpayers reported their tax liability based on their computation of the highest of four bases, one of which is their entire net income base (Tax Law former § 210 [1] [a-d]). A corporation's entire net income base is computed by calculating its entire net income, generally consisting of its investment income (Tax Law former § 208 [6]) and its business income (Tax Law former § 208 [8]; *see* Tax Law former §§ 210 [1] [a]; [3]; 208 [9]; 209 [1]). In turn, the corporation's investment income and business income are allocated to New York pursuant to the corporation's investment allocation percentage (IAC) (Tax Law former § 210 [3] [b]) and its business allocation percentage (BAP) (Tax Law former § 210 [3] [a]), with the resulting amounts totaled to arrive at the corporation's entire net income base, which is then subjected to tax at the applicable rate. For the majority of corporations, the applicable rate during the years in issue was 7.1%. However, as will be discussed, the Tax Law was amended to provide certain manufacturers with preferential tax rates. As noted in the findings of fact, the Raytheon combined group filed amended combined reports for the tax year ended December 31, 2010 utilizing the preferential tax rates applicable to a qualified New York manufacturer. For the tax years ended December 31, 2011, and December 31, 2012, Raytheon combined group filed amended combined reports utilizing the preferential tax rates available to qualified New York manufacturers and eligible qualified New York manufacturers. For the tax year ended

¹ An additional surcharge tax is imposed, per Tax Law former § 209-B, upon corporations located or doing business within the Metropolitan Commuter Transportation District (MCTD).

December 31, 2013, the Raytheon combined group originally filed its combined tax report as a qualified New York manufacturer and subsequently filed an amended combined report using the applicable rate of an eligible qualified New York manufacturer. For the tax years ended December 31, 2014 and 2015, the Raytheon combined group filed combined reports as a qualified New York manufacturer.

C. During 2010 through 2013, the applicable rate of a “qualified New York manufacturer,” was 6.5%. (Tax Law former § 210 [1] [a] [vi]); the applicable rate was reduced to 0% for 2014 and 2015 (Tax Law former § 210 [1] [a] [vi]). During the period in issue, Tax Law former § 210 (1) (a) (vi) defined a “qualified New York manufacturer” as follows:

“A ‘*qualified New York manufacturer*’ is a manufacturer which has property in New York which is described in clause (A) of subparagraph (i) of paragraph (b) of subdivision twelve of this section and either (I) the adjusted basis of such property for federal income tax purposes at the close of the taxable year is at least one million dollars or (II) all of its real and personal property is located in New York” (emphasis added).

D. Addressing whether the Raytheon combined group was a qualified New York manufacturer, it must be determined whether the Raytheon combined group was a “manufacturer.” Tax Law former § 210 (1) (a) (vi) defined “manufacturer” as follow:

“The term ‘manufacturer’ shall mean *a taxpayer* which during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. However, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity shall not be qualifying activities for a manufacturer under this subparagraph. Moreover, *the combined group* shall be considered a “manufacturer” for purposes of this subparagraph only if *the combined group* during the taxable year is principally engaged in the activities set forth in this paragraph, or any combination thereof. *A taxpayer or a combined group* shall be ‘principally engaged’ in activities described above if, during the taxable year, more than fifty percent of the gross receipts of the *taxpayer or combined group*, respectively, are derived from receipts from the sale of goods produced by such activities. In computing a *combined group's gross receipts*, intercorporate receipts shall be eliminated” (emphasis added).

E. Under the plain reading of the statute, a corporation or a combined group of corporations is a qualified New York manufacturer if: (i) it is a manufacturer; (ii) has property in New York that is described in Tax Law former § 210 (12) (b) (i) (A) (i.e., property used to produce goods); and (iii) either the adjusted basis of that property for federal income tax purposes at the close of the taxable year is at least \$1 million or all of its real and personal property must be located in New York. Here, there is no dispute that the Raytheon combined group was a manufacturer as that term is defined. However, the Raytheon combined group was not a “qualified New York manufacturer” because it does not satisfy the property requirement as there is no manufacturing occurring within New York.² In this case, petitioner acknowledges as much, but contends that: (i) denying the Raytheon combined group use of the preferential rates violates the Commerce Clause of the United States Constitution; and (ii) the Raytheon combined group met the alternative definition of a qualified New York manufacturer because it was a qualified emerging technology company (QETC).

² For tax years beginning on or after January 1, 2012 and prior to January 1, 2015, Tax Law former § 210 (1) (a) (vi) set the applicable rate of 3.25% for an “eligible qualified New York manufacturer.” Tax Law § 210 (1) (a) (vi) also went on to provide that:

“ The commissioner shall establish guidelines and criteria that specify requirements by which a manufacturer may be classified as an eligible qualified New York manufacturer. Criteria may include but not be limited to factors such as regional unemployment, the economic impact that manufacturing has on the surrounding community, population decline within the region and median income within the region in which the manufacturer is located. In establishing these guidelines and criteria, the commissioner shall endeavor that the total annual cost of the lower rates shall not exceed twenty-five million dollars.”

Guidelines were subsequently issued by the Division in the form of a Technical Services Bureau Memorandum, TSB-M-13(1)C. Because petitioner did not have manufacturing property in New York to be a qualified New York manufacturer, it follows then that it did not meet the definition of an “eligible qualified New York manufacturer” regardless of whether it met the additional requirements as set forth in TSB-M-13(1)C. The legality of setting forth guidelines as required by the statute in the form of a Technical Services Bureau Memorandum, rather than establishing same in regulations in accordance with the State Administrative Procedure Act is not heretofore addressed.

F. With respect to petitioner's Commerce Clause challenge, petitioner argues that the definition of a "qualified New York manufacturer" and/or "eligible qualified New York manufacturer," which required that the corporation or combined group of corporations have manufacturing property in New York in order to qualify for the preferential tax rates, violates the Commerce Clause of the United States Constitution. Petitioner frames its argument in terms of both applied and facial challenges to the statute. Review of petitioner's arguments on this score amounts to a facial challenge to the statute. Because the Division of Tax Appeals lacks jurisdiction to consider facial validity challenges of statutes (*see Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988), these arguments are not addressed.

G. Petitioner's alternative argument is that it was eligible to be taxed as a "qualified New York manufacturer" based upon its status as a QETC. During 2010 through 2013, included within the definition of a "qualified New York manufacturer" was ". . . a taxpayer which is defined as a *qualified emerging technology company* under paragraph (c) of subdivision one of section thirty-one hundred two-e of the public authorities law regardless of the ten million dollar limitation expressed in subparagraph one of such paragraph (c)" (emphasis added). Beginning in 2014, a QETC was removed from the definition of a qualified New York manufacturer and was taxed at 5.9%, the applicable rate and reduced to 5.7% for 2015 (Tax Law former § 210 [1] [a] [vii]). In denying the Raytheon combined group's claims for refund and assertion of tax, the Division, relying on TSB-M-08 (1) C, has taken the position that each member of a combined group must meet the definition of a QETC for the combined group to qualify for the preferential tax rates at which QETC's were taxed during the years in issue.³

³ In January of 2008, the Division issued TSB-M-08 (1) C, which provides that in order for a combined group to file as a QETC, each member of the combined group had to be a QETC.

H. Petitioner's argument is rejected. Analysis of the statute and Public Authorities Law § 3102-e indicates that the Division's interpretation as articulated in the TSB-M-08 (C) I is correct as set forth below. The statute clearly provides that a combined group may be treated as a "manufacturer" as that term is defined if the combined group as a whole meets the definition of a "manufacturer." In turn, a combined group that is a manufacturer would be taxed at the preferential tax rates applicable to a "qualified New York manufacturer" assuming the property requirement was met. Tax Law former § 210.1 (a) (vi) and (vii), as in effect during the period at issue, did not similarly provide a combined group may be treated as a QETC if the group taken as a whole met the definition of a QETC. Under the versions of the statute in effect during 2010 through 2015, preferential rates were available to a "taxpayer" who met the definition of a QETC, not to a combined group who met the definition of a QETC. Tax Law § 208.2 defines "taxpayer" as "any corporation subject to tax under this article." Corporation is in turn defined as a single entity (Tax Law § 208.1). Unlike the definition of a "manufacturer" in the Tax Law, the statute does not provide a combined group of corporations may be treated as a QETC. The exclusion of such a provision in the definition of a QETC in the statute is an indication that such exclusion was intended. "The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended" (*Matter of Robert Bruce McLane Assoc. v Urbach*, 232 AD2d 826, 828 [3rd Dept 1996]), citing *Pajak v Pajak*, 56 NY2d 394, 397, citing McKinney's Cons Law of NY Book 1, Statutes § 74). Further support for the Division's interpretation comes from the definition of a QETC found in Public Authorities Law § 3102-E (c), which provides:

"Qualified emerging technology company shall mean *a company* located in New York state: (1) whose primary products or services are classified as emerging technologies and whose total annual product sales are ten million dollars or less; or (2) *a company* which has research and development activities in New York

state and whose ratio of research and development funds to net sales equals or exceeds the average ratio for all surveyed companies classified as determined by the National Science Foundation in the most recent published results from its Survey of Industry Research and Development, or any comparable successor survey as determined by the department”

Under this definition, a QETC refers to a single entity, and not to a group of corporations treated as one corporation for purposes of reporting tax. Here, while it is acknowledged that a combined group of corporations is generally treated as a single corporation for purposes of reporting and paying tax (*see* Tax Law § 210-C [4]), the determination of whether a group of corporations can file as a combined group and report and pay taxes at a preferential rate must be made in the first instance.⁴ Here, in order for a group of corporations to be taxed as a QETC, all members must be a QETC in their separate capacities. Because each member of the Raytheon combined group did not qualify as QETC in their separate capacity, the Raytheon combined group was not eligible to file as a QETC.^{5, 6}

I. Finally, the Division imposed penalties for substantial understatement of tax on the deficiency for the 2013, 2014 and 2015 tax years pursuant to Tax Law § 1085 (k), for substantial understatement of tax on the deficiency for the 2013, 2014 and 2015 tax years. Pursuant to Tax Law § 1085 (k), all or any part of the addition to tax may be waived on a showing by petitioner that there was reasonable cause for the understatement and that it acted in good faith. In this

⁴ It is observed that the Division has drafted a regulation that specifically provides: “[f]or a combined group to be eligible for the preferential tax treatment available to qualified emerging technology companies, every member of the combined group must be a qualified emerging technology company (*see* www.tax.ny.gov draft regulation 6-2.1 [e]).

⁵ Petitioner, in the alternative, has asserted that should it be determined that all members of a combined group must separately qualify as QETC’s in order to be taxed at the preferential rates applicable to a QETC, it should be entitled to compute its liability on a separate company basis. As noted by the Division, there is no authority under the Tax Law for individual members of a combined group to separately utilize the reduced tax rates.

⁶ No allegation has been made by the Division, that petitioner, as a separate company would not otherwise qualify to be taxed as a QETC.

case, petitioner alleges that reasonable cause exists because it had substantial authority for the position it took. This assertion is rejected. First, with respect to petitioner's reporting position for 2013, the Division's publication of TSB-M-08 (1) C in 2008 clearly articulates that all members of a combined group must be QETC's in order to file a combined report as a QETC. The Division's position, as set forth in the TSB-M, was clearly articulated beginning in 2008. Petitioner chose to ignore the Division's guidance and file as it believed the law to be. If reasonable cause does not exist when a taxpayer relies upon professional advice in the absence of inquiry to ascertain the position of the Division (see *CBS Corp. v Tax Appeals Tribunal*, 56 AD3d 908, 911 [3rd Dept 2008], then ignoring the articulated position of the Division cannot support a showing of reasonable cause. With respect to petitioner's position for 2014 and 2015, petitioner computed tax on its entire net income base using the rates applicable to qualified New York manufacturers despite not having manufacturing property in New York. Simply stated, reasonable cause does not exist where the taxpayer chooses to ignore the mandates of the statute based upon its belief that same is unconstitutional. For these reasons, penalties are sustained.

J. Based upon the foregoing, the petition of Raytheon Company is denied and the August 18, 2016 refund denial and the August 4, 2017 notice of deficiency, as modified by the August 16, 2019 conciliation order, are sustained.

DATED: Albany, New York
March 16, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE